16-1082-cv(L), 16-1156-cv(XAP)

United States Court of Appeals

for the

Second Circuit

TIME WARNER CABLE OF NEW YORK CITY LLC,

Plaintiff-Appellee-Cross-Appellant,

– v. –

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL UNION NO. 3,

Defendant-Appellant-Cross-Appellee,

DEREK JORDAN, Individually and in his capacity as Business Agent of Local 3,

Defendant,

NATIONAL LABOR RELATIONS BOARD,

Intervenor-Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE-CROSS-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiff-Appellant Time Warner Cable New York City LLC is wholly-owned by Time Warner Cable Enterprises LLC. TWC Administration LLC and Time Warner Cable Enterprises LLC are indirect subsidiaries of Charter Communications, Inc., their ultimate parent. Time Warner Cable Inc. was recently merged into Spectrum Management Holding Company, LLC, an indirect subsidiary of Charter Communications, Inc., and no longer exists. Liberty Broadband Corporation is a publicly held company that owns 10% or more of Charter Communications, Inc.'s stock.

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STATEMENT OF JURISDICTION

The District Court had jurisdiction over this case pursuant to Section 301(a) of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185(a), because Plaintiff/Appellee/Cross-Appellant sought to confirm an arbitration award allegedly arising under a collective bargaining agreement.

The Court of Appeals has jurisdiction over this appeal, because it challenges the final decision of a United States District Court. 28 U.S.C. § 1291.

Appellants' Notice of Appeal was timely filed on April 8, 2016, eight days after issuance of the District Court's March 31, 2016 Judgment; Cross-Appellant's Notice of Appeal was timely filed on April 15, 2016, sixteen days after issuance of the District Court's March 31, 2016 Judgment. Fed. R. App. P. 3(a)(1) & 4(a)(1)(A).

STATEMENT OF ISSUES PRESENTED

1. Did the District Court err by refusing to determine that the parties had and continue to have a valid and binding collective bargaining agreement, given that: (a) Defendant-Appellant signed and repeatedly conceded that it was bound by a memorandum of agreement continuing, with only specified changes, the parties' prior collective bargaining agreement, which prohibited strikes and required arbitration of all disputes; (b) its members have enjoyed the increased pay and benefits mandated by that agreement; and (c) both parties repeatedly invoked the agreement's grievance and arbitration clauses, before and after the events that led to this case?

2. Even if there is no collective bargaining agreement, did the District Court correctly confirm the arbitrator's award of monetary damages for Defendant-Appellant's conduct, on the basis of the parties' signed stand-alone agreement to arbitrate and Defendant-Appellant's failure to reserve any objections to substantive arbitrability?

3. Regardless of the answer to the preceding questions, where the parties agreed to arbitrate whether Defendant-Appellant's mass picketing violated the parties' no-strike provision and, if so, the determination of the appropriate remedy, did the District Court err by refusing to confirm that portion of an arbitration award directing Defendant-Appellant not to engage in similar future misconduct?

STATEMENT OF THE CASE

A. The Parties

With its " 'long history of unfair labor practices,' " Defendant/Appellant International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 3 ("Local 3") is a union whose "organizing activities have been oft-reviewed by this Court." *NLRB v. Local 3, Int'l Bhd. of Elec. Workers*, 471 F.3d 399, 402 (2d Cir. 2006) (quoting *NLRB v. Local 3*, 861 F.2d 44, 45-46 (2d Cir. 1988))

Plaintiff/Cross-Appellant Time Warner Cable New York City LLC ("Time Warner Cable") provides cable television, internet, and telephone services to residential and commercial subscribers throughout the United States. (JA 548.) Local 3 represents Time Warner Cable employees at various locations in the New York City metropolitan area, including at its facility at 59 Paidge Avenue in Brooklyn. (JA 33.)

B. The Parties Extend Their Collective Bargaining Agreement And Its No-Strike and Arbitration Provisions Through 2017

There is no dispute that Time Warner Cable and Local 3 were parties to a collective bargaining agreement for the period April 1, 2009 through March 31, 2013. (JA 33.) Section 24 of that agreement establishes that any "dispute or disagreement" over its interpretation or application not resolved by the parties is subject to binding arbitration. (JA 167.) Additionally, Section 31 states: "There shall be no cessation or stoppage of work, service or employment, on the part of, or

at the instance of either party, during the term of this Agreement." (JA 170.) Further, Section 49 of states: "In the event any provision of this Agreement is found to be unlawful or unenforceable, the remainder of the Agreement shall remain in force and effect." (JA 184.)

On or about March 28, 2013, both parties signed a memorandum of agreement (MOA) that, by its terms, extended their collective bargaining agreement from April 1, 2013 through March 31, 2017 with certain modifications. (JA 135, 189, 388-89.) The MOA – and thus the parties' 2013-2017 agreement – was then ratified by Local 3's membership. As noted on Local 3's website: "On April 4, 2013 over 1,300 members from Time Warner Cable filled the auditorium at Local 3 to vote. They unanimously ratified a four-year agreement which maintains their benefits, increased wages by 12% and provides continued training." (JA 197.)

In fact, the MOA also granted increased annuity contributions, and required the Company to pay employee FICA contributions; it also contains various other adjustments to the prior collective bargaining agreement regarding work shifts and technical career progression programs and training. (JA 190-95.) On the other hand, and most significantly, the MOA did not modify the pre-existing arbitration and no-strike language in any respect, and those clauses therefore remained in effect in the new agreement. (*See generally id*.)

For approximately two years after signing and ratifying the MOA, Local 3 recognized and benefited from its provisions and those of the prior collective bargaining agreement that it encompassed by reference. Local 3 has never asserted that Time Warner Cable failed to pay its members the increased wages and benefits detailed in the MOA, or failed to deduct union dues pursuant to the pre-existing "Union Security" clause in the collective bargaining agreement. (JA 135-36, 154, 390.)

Local 3 also filed at least ten new arbitrations against Time Warner Cable during 2013 and 2014 pursuant to the agreement's grievance and arbitration clause. (JA 390-91.) On each occasion, Local 3 served a "Notice of Intention To Arbitrate" requesting "a duly appointed impartial Arbitrator . . . to arbitrate the issues set forth below *under the terms of an agreement* between the parties," advising that "arbitration is sought *pursuant to a collective bargaining agreement* existing between you and Local 3," and framing the issue to be arbitrated as "[w]hether the Employer violated various Articles of the CBA." (JA 390-91.) During the same period, multiple Arbitrators recognized the parties' collective bargaining agreement and its arbitration provision by deciding disputes brought forward by the Union pursuant thereto. (JA 202, 218, 229, 255, 264-65.)

C. Local 3's Blockade and Participation in the Resulting Arbitration

On April 1, 2014, Time Warner Cable issued two-day suspensions to several

foremen who (at Local 3's behest) had repeatedly disregarded supervisors' instructions to accept Company-issued tools, as well as to a shop steward who engaged in loud, profane, and threatening behavior during a meeting. (JA 23-24, 507, 514.) On April 2, 2014, in what Local 3 now concedes was a "protest" over the suspensions (Ap. Br. 39), its Business Agent Derek Jordan led other Local 3 agents and Time Warner Cable employees in blockading the Company's facility. They parked their cars perpendicular to traffic and gathered *en masse* in the middle of the street for well over an hour, rendering Paidge Avenue and the adjoining intersection impassable and preventing employees from timely reporting for work. The event was captured on a video submitted as evidence to the District Court. (JA 69-70, 323.)

In response, Time Warner Cable filed its initial Complaint in this action and moved for an injunction barring further strike activity pursuant to *Boys Markets v. Retail Clerks Union*, 398 U.S. 235 (1970). (JA 18.) The District Court conducted a three-day hearing on Time Warner Cable's motion. (JA 46-121.) During the proceedings, Local 3 did not dispute the existence of a valid and binding collective bargaining agreement and its no-strike and arbitration obligations. (*See generally id.*) Instead, despite conclusive video evidence to the contrary, Local 3's counsel merely stated that there "never was and never will be" any blockade. (JA 52-53.) While conceding that there was a MOA that "summarizes negotiated terms from

the parties' collective bargaining negotiations for a successor . . . collective bargaining agreement," Local 3 asserted that the events of April 2 were just a "safety meeting." (*See* JA 33, 37.) The District Court rejected Local 3's statements as "euphemisms." (JA 113.) On May 5, 2014 the District Court issued an opinion and order, which found that "Time Warner and Local 3 are parties to a Collective Bargaining Agreement" with provisions mandating grieving and arbitrating all disputes and forbidding any work stoppages, and that the April 2, 2014 blockade violated the latter provision. (Docket No. 17, at 2-4.)

Time Warner Cable took Jordan's deposition on August 21, 2014. Jordan readily testified that Time Warner Cable and Local 3 are "currently parties to a CBA," because their 2009-2013 agreement was extended by four years when the parties signed the MOA. (JA 278-79.) He also conceded that the agreement's no-strike provision means, in his words, that "basically you can't stop any work from being performed." (JA 280.)

Meanwhile, on May 9, 2014 Time Warner Cable filed a demand for arbitration over Local 3's strike activities; the demand (according to Local 3's own recitation) complained about: "[the] Union's repeated violations of [CBA] Section 31 – Cessation or Stoppage of Work since in or about September and continuing through and including March 2014 and April 2, 2014." (JA 285.)

On or about June 12, 2014, Local 3 moved to dismiss the arbitration demand

on procedural grounds. (JA 282-95.) Significantly, its motion did not suggest that there was no collective bargaining agreement in effect between the parties; to the contrary, Local 3 again conceded that "[t]he Union and the Employer have been parties to a series of collective bargaining agreements," which included the grievance/arbitration and no-cessation of work provisions. (JA 283.) Local 3 argued (only) that Time Warner Cable's demand for arbitration was untimely, and that by bringing a *Boys Markets* action in the District Court, the Company had waived its right to arbitrate. (*See generally* JA 282-95.) Arbitrator Daniel F. Brent denied this motion in a June 27, 2014 opinion, which repeatedly notes the existence of a collective bargaining agreement between the parties that includes arbitration and no-strike provisions. (JA 297-309.)

Arbitration hearings were held on July 24, September 16, and September 18, 2014. On the first day, both parties signed the following agreement: "The undersigned parties agree to submit the following dispute to Daniel F. Brent for binding arbitration: Did the Union violate the no-strike provision of the collective bargaining agreement? If so, what shall be the remedy?" (JA 527.)

At the hearing on September 18, Jordan admitted yet again that "Time Warner Cable and Local 3 were parties to a collective bargaining agreement from 2009 to 2013" and "are still parties to a collective bargaining agreement," because "in 2013 the prior collective bargaining agreement, that is the 2009 to 2013

agreement, was extended by a memorandum of agreement." (JA 312.) He further conceded (again) that having signed both agreements as Local 3's Business Agent, he is "familiar with the no-strike provision that's in the 2009 to 2013 agreement," which basically says "there can't be any stoppage of work," and "nothing in the 2013 memorandum of agreement changed that." (JA 313.) Finally, Jordan stated that he was "well aware" of the grievance and arbitration provision in the 2009-2013 agreement, which says "if there's any disagreement between the parties, it has to be grieved and eventually arbitrated," and "that wasn't changed in the memorandum of agreement in 2013." (JA 314-15.) Consistent with Local 3's position during the hearings, its post-hearing brief never asserted that the collective bargaining agreement and its no-strike obligation was null or void. (JA 318-45.)

On December 12, 2014, Arbitrator Brent issued an interim award and opinion. (JA 347-65.) After reviewing the same video evidence as the District Court, and similarly rejecting Local 3's "safety meeting" arguments (JA 359), he held that the April 2, 2014 blockade "violate[d] the prohibition against cessation or stoppage of work contained in the parties' collective bargaining agreement," and "explicitly directed [Local 3] not to engage in similar violations of the contractual 'no-strike' provisions in the future." (JA 364.) He also ordered Local 3 to "reimburse the Company for the one day wage cost of the guard who testified in [the preliminary injunction] hearing," as well as for "contractor costs incurred to

cover both the additional hours contractors worked on April 2, 2014 and on days when contractors may have been engaged to perform the work of bargaining unit employees who were suspended for participation in the work stoppage on April 2, 2014." (JA 363-65.) The Arbitrator ordered Time Warner Cable to submit documentation supporting the computation of these categories of damages. (JA 365.)

Time Warner Cable brought a related action to confirm that interim award on February 11, 2015. (*See* 15 Civ. 700, Docket No. 1.)[1] Local 3 moved to dismiss the action on the sole basis that the Arbitrator's award failed to determine the dollar amount of damages, and thus was not a "final award"; the District Court later agreed and granted Local 3's motion. (*See generally id.*, Docket No. 15; Docket Nos. 38 at 3-5.) But again, Local 3 did not dispute the Arbitrator's authority or the collective bargaining agreement's existence. To the contrary, Local 3's supporting brief stated: "The terms and conditions of employment for the TWC employees represented by Local 3 are contained in a collective bargaining agreement (CBA) between Local 3 and TWC." (*Id.* at 1.) When Time Warner Cable moved for summary judgment to confirm the arbitration award, Local 3's responsive Local Civil Rule 56.1 Statement similarly conceded that

[1] "A court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation but rather to establish the fact of such litigation and related filings." *Global Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 157 (2d Cir. 2006).

"[t]he terms and conditions of employment for the Time Warner Cable employees represented by Local 3 are contained in a collective bargaining agreement (CBA) between Local 3 and Time Warner Cable," and further, that "[t]he CBA contains a no-strike clause," and "a mandatory dispute resolution procedure that provides for arbitration and that the 'decision of the arbitrator shall be final and binding.' " (*Compare id.*, Docket Nos. 20, 27, ¶¶ 3-5, 8-9.)

D. After Arbitration, Local 3 Unveiled Retroactive Non-Arbitrability Arguments, Which the Arbitrator Considered and Rejected

While Local 3 signed and ratified the parties' MOA in April 2013, it insisted that certain "riders" attached to the prior collective bargaining agreement, governing work location-specific terms and conditions, continued in effect. On that basis, it refused to execute a new integrated contract document without the riders. (JA 139.) None of the terms and conditions addressed in the riders related in any way to the master agreement's grievance/arbitration or no-strike clauses. (*Id.*) For example, the sole rider relating to Time Warner Cable's Southern Manhattan area (which includes the Paidge Avenue facility blockaded by Local 3 in this dispute) addresses Local 3's jurisdiction over "service and maintenance of local origination," what level of employee would perform outbound dispatch work, the wage rate for clerical dispatch functions, and the procedures for certain "standby" work. (JA 139-40.)

As a result, on March 31, 2014 Time Warner Cable filed unfair labor

practice charges against Local 3 pursuant to Sections 8(b)(3) and 8(d) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158, which prohibits a union's refusal to sign a writing incorporating a collective bargaining agreement reached with an employer. (JA 140.) A Regional Director of the National Labor Relations Board (NLRB) determined that the charges had merit and issued an unfair labor practice complaint against Local 3; the matter proceeded to trial before Administrate Law Judge (ALJ) Steven Fish. (JA 410.)

On April 28, 2015, ALJ Fish issued a recommended decision finding that Local 3 did not violate the NLRA by refusing to execute the document tendered by Time Warner Cable that omitted the disputed riders; the NLRB later affirmed his decision on October 29. (*See* JA 410, 428.) The ALJ noted that while the parties disputed whether the riders were included in their new collective bargaining agreement, "[t]here is no dispute that the parties executed [the MOA] on March 28, 2013, which both parties believed represented an agreement to execute a successor contract, by both parties incorporating the [remaining] terms agreed upon." (JA 425.) "Indeed the record established that the parties shook hands, Respondent implemented the improvements set forth in the MOA, and the Respondent's employees ratified the agreement reached by the parties, based upon the terms of the MOA." (*Id.*) But in a single sentence now seized upon by Local 3, the ALJ wrote: "I conclude that the terms of the MOA were ambiguous as to whether the

riders from the previous agreements were to be included in the successors' agreements," and "the parties had plausible but different understandings and beliefs as to [the riders] issue, and therefore there was no meeting of the minds and no contract." (JA 427.)

Thus, the ALJ never questioned that the MOA encompassed the parties' pre-existing grievance/arbitration and no-strike provisions; the only dispute was whether it reincorporated the unrelated, location-specific riders. Nothing in the ALJ decision states, or even suggests, any doubt regarding the continuing application of the longstanding no-strike and grievance/arbitration clauses.[2]

Yet one week later, Local 3 presented the ALJ decision to the District Court and asserted: "[the ALJ's] holding that there is no collective bargaining agreement (CBA) in effect between TWC and Local 3 because there was no meeting of the minds during the parties' 2013 contract negotiations, results in there being no subject matter jurisdiction under § 301 of the Labor Management Relations Act." (15 Civ. 700, Docket No. 36, at 1.) Accordingly, Local 3 argued: "because there

[2] Local 3 has argued that the NLRB decision precludes any further dispute over whether the parties' collective bargaining agreement ever existed. But collateral estoppel requires that the issue previously litigated was "necessary to support a valid and final judgment on the merits." *Local 32B-32J SEIU v. NLRB*, 982 F.2d 845, 845 (2d Cir. 1993). In the NLRB case, the parties contested *only* whether the disputed riders continued in effect; to dismiss the unfair labor practice complaint the NLRB only needed to find that Time Warner Cable's tendered rider-less version did not accurately embody what was agreed to (and that the Union therefore was not obliged to execute it). Since the NLRB found that the parties disagreed on the continued effect of the riders, that finding was sufficient; the NLRB did *not* have to find that the parties lacked a meeting of the minds on the contract's other provisions or its existence overall. Thus the single sentence referring to "no contract" is *dicta*, and as such, is entitled to no preclusive effect in an unrelated dispute.

was no contract in effect on April 2, 2014, when the alleged breach of the no-strike clause occurred, the Court should dismiss both this case and the § 301 claim . . . in the related case, Case 14-CV-2437 . . ." (*Id.*)

In response, the Court correctly noted that while Local 3 had "object[ed] to the timeliness of the arbitral filing," and "conten[ded] that plaintiff waived the right to arbitrate through court filings," it nevertheless "continued to participate in the proceeding, failing to object to the issue of *substantive* arbitrability." (*Id.*, Docket No. 38, at 3 (emphasis in original).) The Court added that "[b]y participating in arbitration and failing to raise any substantive objection to the proceedings . . . defendant arguably has waived its right to challenge the present arbitration and the court's power to confirm any resulting award," but it deferred as unripe "the issue of whether waiver by participation exists should the National Labor Relations Board find that there was no collective bargaining agreement." (*Id.* at 7-8.)

On May 22, 2015, Local 3 wrote Arbitrator Brent to announce that in light of ALJ Fish's decision, "the premise of your three interim awards, that there was a CBA in effect at the time the Union allegedly violated the CBA's no-strike clause, is no longer viable," and "[b]ecause there was no CBA in effect at the time of the alleged breach in April 2014, any past or future award you have or may issue in favor of Time Warner Cable will be unenforceable," so "the Union objects to any

further proceedings as there is no contract under which you have authority to proceed." (JA 367.) Time Warner Cable responded by letter to refute these assertions. (JA 368-71.)

On July 8, 2015, Arbitrator Brent issued an "Award of Arbitrator" and supporting opinion discussing the parties' dispute over arbitrability and jurisdiction in light of the ALJ's rider-related decision. (JA 373-84.) He noted that "a careful reading of Administrative Law Judge Steven Fish's decision . . . reveals that his specific finding was that there was not a meeting of the minds regarding inclusion of certain local riders," which is no basis "to consider the arbitration clause contained in both the predecessor and newly negotiated collective bargaining agreement to have been revoked, either retroactively or prospectively," so as to "deprive this Arbitrator of legitimate authority to carry out the ministerial duty of quantifying the costs of replacing the three Tech Ops Technicians during their suspensions pursuant to the Award issued on December 12, 2014, prior to Judge Fish's decision." (JA 378-79.) The Arbitrator concluded that his authority and duty was "to render a decision pursuant to the arbitration clause in [the parties'] collective bargaining agreement, particularly as supplemented by their execution of a document signed at the arbitration hearing on July 24, 2014 explicitly and mutually conferring authority on me to issue a binding arbitration decision

addressing the issue they submitted." (JA 379-80.)[3]

E. The Final Arbitration Award and Motions To Confirm and Vacate It

On November 30, 2015, Arbitrator Brent issued a "Final Award of Arbitrator," incorporating his prior awards by reference, reiterating that Local 3 "did violate the prohibition against cessation or stoppage of work contained in the parties' collective bargaining agreement," ordering it not to engage in similar contractual violations in the future, and awarding Time Warner Cable damages of $19,297.96. (JA 442-43.)

The Arbitrator's accompanying opinion reviews the parties' arguments and submissions regarding Time Warner Cable's request for a correction of the prior damages amount. (JA 445-49.) The opinion rejects Local 3's demand to take extensive discovery and conduct another hearing as contrary to its own assertions that the NLRB's decision ended its duty to arbitrate and the Arbitrator's jurisdiction. (JA 448-49.) The opinion reiterates that "the parties executed an agreement to arbitrate on the day of the first hearing in this matter that explicitly

[3] Following the NLRB's October 29, 2015 adoption of the ALJ decision, Local 3 moved on November 4, 2015 to have the District Court enjoin the Arbitrator from issuing a final award. (JA 11, 122-23.) It was at the hearing on this motion that the District Court asked Local 3: "What makes you think he is going to flout the NLRB?" (JA 123.) Local 3 now insists that "[b]y the District Court's very analysis, the Arbitrator issued his own brand of justice and 'flouted' the NLRB's ruling that there was 'no meeting of the minds and no contract.' " But Judge Weinstein, who acknowledged during the same hearing that he had not yet read the motion papers, asked his somewhat rhetorical question after only hearing Local 3's position on the motion. (JA 122.) It certainly reflected no "analysis." And at a subsequent oral argument on Time Warner Cable's motion to confirm the arbitration award, the Judge expressed surprise that he had previously used the word "flout." (JA 534.)

submitted their dispute to me for binding arbitration," and so, "I have valid jurisdiction to decide the ongoing dispute about correcting an error of omission in my Award at the request of one party, regardless of what the NLRB may have determined about the validity of the collective bargaining agreement, but subject, of course, to the Court's appropriate subsequent determination of any dispute between the Parties regarding enforcement of my Awards." (JA 449.)

Turning to the damages amount, the Arbitrator noted that because "the Company did submit proofs about contractor expenses during the hearings, a valid basis exists in the evidentiary record for the Arbitrator to correct his omission regarding the issue of contractors' costs." (JA 449.) "Thus," he concluded, "the Company's estimate [of such damages] must be adjusted" to $9,000 "to account for the hours worked by contractors who replaced the appointments actually missed by bargaining unit employees." (JA 449.) Adding that to the previously awarded $10,297.96 yielded a total award of $19,297.96. (JA 449.)

On January 20, 2016, Time Warner Cable moved for summary judgment to confirm the final arbitration award. (JA 126.) Local 3 opposed the motion and cross-moved for summary judgment vacating the award. (JA 385-86.) The NLRB then moved to intervene. (JA 485-91.)

On March 16, 2016, the District Court issued the Memorandum and Order at issue here. (SA 1-42.) After thoroughly reviewing the factual and procedural

history described above and the applicable legal standards, the Court determined that "the document executed by the parties on July 24, 2014" constituted a "limited separate and binding arbitration agreement" that was "the foundational document for the arbitration" and "clearly evinces the parties' intention to arbitrate the narrow dispute at issue in this case." (SA 35-37.) Through "the magic of the broad federal arbitration statute," he reasoned, "an arbitration may be specifically authorized by the parties to decide whether a non-operative no-strike clause has been violated, and to assess damages," even if he "was not authorized to also rely for jurisdiction on the general arbitration clause contained in the CBA."

The Judge also noted that "[d]espite being aware of TWC's pending NLRB challenge concerning Loca1 3's failure to [sign the integrated contract document tendered by Time Warner Cable], throughout the arbitration proceedings the union failed to raise any substantive objection to the arbitrator's authority to decide the dispute," and "only challenged the arbitrator's authority after the arbitration record was closed and an unfavorable interim award had been issued against it." (JA 37.) Thus, "Local 3 waived its right to contest the arbitrator's jurisdiction." (*Id.*) The District Court further held that the Arbitrator had "acted within the scope of the parties' narrow agreement when he issued his final award finding that Local 3 had violated the CBA's no-strike clause and awarding damages to TWC." (SA 38.)

The District Court rejected Local 3's argument that the Arbitrator's award violated public policy, and reasoned that it "can be enforced with no disrespect for the NLRB decision" insofar as it called for "money damages based on the specific agreement to arbitrate" the events of April 2, 2014 and "does not, however, apply to any future work stoppages." (SA 40.) But the District Court ordered the Arbitrator's direction that Local 3 "not to engage in similar violations of the contractual 'no-strike' provisions in the future" stricken from the award, since "[t]he issue of future work stoppages was not presented to the arbitrator by the parties' specific arbitration agreement of July 24, 2014," and "because the NLRB determined that there is no current CBA between the parties, this language concerning potential future actions by Local 3 or its members exceeds the arbitrator's authority." (SA 41.)

The Memorandum and Order was followed by a final judgment which reiterated that "the November 30, 2015 final arbitration award is confirmed," except for the language directing the Union "not to engage in similar violations of the contractual 'no-strike' provisions in the future," which was stricken, and directed that "Local Union No. 3 shall pay Time Warner Cable of New York City LLC the sum of $19,297.96 plus post-judgment interest." (SA 43.) Both sides have cross-appealed from that judgment; the intervenor NLRB, notably, is only challenging Time Warner Cable's cross-appeal of the District Court's refusal to

confirm the Arbitrator's award of future relief, and does not take issue with the award of monetary damages. (*See* Docket No. 54-1, at 7.)

SUMMARY OF ARGUMENT

Local 3 agreed to arbitrate its flagrantly illegal and contract-violating blockade – and it lost. Since then, it has been attempting to avoid the consequences of its mischief – and ensure its ability to engage in similar future misconduct – through a technicality: the ostensible retroactive nullification of its own collectively bargained agreements to refrain from striking over, and to arbitrate, any disputes with Time Warner Cable. Its maneuver, to borrow a phrase from this Court, "evidences a remarkable chutzpah." *In re Smith*, 645 F.3d 186, 190 (2d Cir. 2011).

Local 3 does not deny that it has been enjoying the fruits of its agreement with Time Warner Cable for several years (particularly in the form of higher wages and benefits for its members, and union dues deductions for itself). It cannot erase its repeated and explicit concessions (under oath and in representations to this Court and the District Court) that the parties have an enforceable collective bargaining agreement under which it must refrain from striking and arbitrate all grievances. Nor can Local 3 deny its written agreement to arbitrate this dispute – and its failure to challenge the Arbitrator's jurisdiction until it was too late.

Local 3's argument, instead, is that the NLRB's purported post-arbitration invalidation of the parties' contract – under its own "meeting of the minds on all issues" standard, which federal courts do not share – eliminated the Arbitrator's jurisdiction *nunc pro tunc*, rendered his award unenforceable, and even eliminated the District Court's jurisdiction over this action to confirm the Arbitrator's award. But the NLRB did not (fairly speaking) invalidate the parties' entire contract – it only determined that they had failed to agree on one tangential issue. And Local 3's arguments contravene well-established appellate precedents mandating the most liberal possible interpretation of the existence of union-employer agreements to preserve labor peace, and the most deferential possible treatment of labor arbitration awards.

Where – as here – one party claims that a union-employer contract (not necessarily even a formal collective bargaining agreement) exists and that the other party breached it, a federal court necessarily has jurisdiction over the case, at least to resolve whether that agreement exists. Further, multiple federal appellate courts have held that where – as here – both labor and management express and demonstrate their belief that they are bound by a contract, and where they benefit from its provisions despite some terms remaining unresolved, they cannot then deny the existence of such agreement in order to avoid its arbitration provisions. And multiple federal appellate precedents also hold that where – as here – a party

repeatedly acknowledges its collectively-bargained arbitration obligations, and willingly submits a dispute to arbitration without reserving any objections to arbitrability at the outset, that party is bound by the results of that arbitration. Conversely, no authority supports the notion advanced by Local 3 that a party who agrees without objection to arbitrate a dispute can later oppose confirmation of its result based on a retroactive argument that there was never any collectively bargained agreement to arbitrate.

Presumably realizing that it should not prevail on its arguments that the parties had no contract, or no agreement to arbitrate this dispute, Local 3 devotes the lion's share of its brief to two other arguments that are equally unavailing. First, Local 3 argues that holding it to the outcome of an arbitration to which it consented, concerning a strike it engineered, violating a collective bargaining agreement it signed, would somehow offend "public policy" because that agreement was later (allegedly) nullified. In fact, there is no such public policy, but there are strong public policies that favor enforcing arbitration/no-strike agreements and punishing mass pickets such as the one here. Second, Local 3 asserts that the arbitration award must be vacated pursuant to *Mastro Plastics* – a doctrine that merely insulates from discipline employees who strike over "serious unfair labor practices," which the April 2, 2014 blockade clearly was not, and

which, in any event, does not permit a union to ignore a contractual no-strike obligation.

For these reasons, Local 3's arguments fail, the District Court was entitled to adjudicate this case, and it should have confirmed the Arbitrator's award *in full;* but *at the very least*, the Court appropriately confirmed the monetary portion of the award.

LEGAL STANDARDS

A. Confirmation of Labor Arbitration Awards Under LMRA Section 301

LMRA Section 301 gives federal courts jurisdiction to enforce arbitration awards issued pursuant to contracts between an employer and a labor organization. The Supreme Court has long recognized a strong presumption favoring the arbitrability of labor disputes; thus, "to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under Section 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made." *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

Confirming an arbitration award requires only a summary proceeding, which merely converts an arbitrator's award into the court's judgment. *See D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 110 (2d Cir. 2006). The court's review in such a

proceeding is "severely limited." *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9, 12 (2d Cir. 1997). Such limited judicial review furthers the goals of arbitration: settling disputes efficiently and avoiding long and expensive litigation. *See United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987) (were courts free to scrutinize awards, "the speedy resolution of grievances by private mechanisms would be greatly undermined").

For these reasons, "[t]he showing required to avoid summary confirmation of an arbitration award is high." *Willemijn Houdstermaatschappij*, 103 F.3d at 12. This Court has held repeatedly that district courts are to accord arbitrators an exceptionally high degree of deference in reviewing labor arbitration awards. *See, e.g.*, *Local 97, Int'l Bhd. of Elec. Workers v. Niagara Mohawk Power Corp.*, 196 F.3d 117, 124 (2d Cir. 1999); *and Wackenhut Corp. v. Amalgamated Local 515*, 126 F.3d 29, 31 (2d Cir. 1997) (citations omitted). A district court's review is limited *only* to (1) "whether the arbitrator acted within the scope of his authority," and (2) "whether the award draws its essence from the [parties'] agreement or is merely an example of the arbitrator's own brand of justice." *Local 1199, Drug, Hosp. and Health Care Employees Union v. Brooks Drug Co.*, 956 F.2d 22, 25 (2d Cir. 1992) (citing *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960).

The reviewing court's "principal inquiry" is "whether the arbitrator's award draws its essence from the agreement to arbitrate." *United Bhd. of Carpenters and Joiners of Am. v. Tappan Zee Constructors, LLC*, 804 F.3d 270, 274 (2d Cir. 2015) (internal quotations omitted). Under this standard, "an arbitration award must be upheld when the arbitrator offer[s] even a barely colorable justification for the outcome reached." *Wackenhut*, 126 F.3d at 31 (internal quotations omitted). "The contractual theory of arbitration . . . requires a reviewing court to affirm an award it views as incorrect – even very incorrect – so long as the decision is plausibly grounded in the parties' agreement." *Id.*

B. Standard of Review

When reviewing a district court's decision to confirm or vacate an arbitration award, this Court reviews findings of fact for clear error, and questions of law *de novo*. *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust*, 729 F.3d 99, 103 (2d Cir. 2013); *Local Union No. 38, Sheet Metal Workers' Int'l Ass'n, AFL-CIO v. Custom Air Sys., Inc.*, 357 F.3d 266, 267 (2d Cir. 2004).

ARGUMENT

I. The District Court Had Subject Matter Jurisdiction Pursuant to Section 301(a) of the LMRA

Despite its own jurisdictional statement that "[t]he District Court had jurisdiction under 28 U.S.C. § 1331 and the Labor Management Relations Act," Local 3 simultaneously asserts that "this Court must first determine whether the

District Court properly asserted subject matter jurisdiction over the action under § 301(a)," and claims that it did not, because "the underlying CBA upon which the Arbitrator was mistakenly asked to interpret, was not in effect at the time the parties allegedly entered into a separate agreement to arbitrate." (*Compare* Ap. Br. at 2, 11.) Local 3's argument is, essentially, that by simply announcing a challenge to the existence or validity of a collective bargaining agreement, a party strips federal courts of the jurisdiction to even consider the validity of that agreement. But Local 3 ignores that numerous federal courts – including this one – have squarely rejected this notion.

LMRA Section 301(a) provides, in pertinent part (with emphasis added): "Suits for violation of *contracts between an employer and a labor organization* . . . may be brought in any district court of the United States having jurisdiction of the parties . . ." The statute, notably, does not limit itself to "suits for violation of collective bargaining agreements"; it provides a federal forum for *any* "agreement between employers and labor organizations significant to the maintenance of labor peace between them." *Retail Clerks Int'l Assoc., Local Unions Nos. 128 & 633 v. Lion Dry Goods, Inc.*, 369 U.S. 17, 28 (1962). This includes even post-collective bargaining "interim" agreements between employers and unions to preserve labor peace while negotiating a new formal agreement. *See United Paperworkers Int'l Union, AFL-CIO, Local 274 v. Champion Int'l Corp.*, 81 F.3d 798, 802 (8th Cir.

1996) (citing *United Paperworkers Int'l Union v. Int'l Paper Co.*, 920 F.2d 852, 859 (11th Cir. 1991); *United Paperworkers Int'l Union v. Wells Badger Indus., Inc.*, 835 F.2d 701, 704-05 (7th Cir. 1987); and *Int'l Union, United Mine Workers of Am. v. Big Horn Coal Co.*, 916 F.2d 1499, 1502 (10th Cir. 1990) ("It suffices that the parties' intent to abide by the agreed-upon provisions of any such informal agreement is in some manner manifest.")). As summarized by the Fifth Circuit: "It is well-established that § 301 must be broadly construed to encompass any agreement, written or unwritten, formal or informal, which functions to preserve harmonious relations between labor and management." *Smith v. Kerrville Bus Co., Inc.*, 709 F.2d 914, 920 (5th Cir. 1983) (citing *Retail Clerks*, *et al.*).

The Supreme Court has further explained that "suits for violation of contracts" refers to any suit "filed because a contract has been violated," but "[t]his does not mean that a federal court can never adjudicate the validity of a contract under § 301(a)." *Textron Lycoming Reciprocating Engine Div., Avco Corp. v. United Automobile, Aerospace, Agricultural Implement Workers of Am., Int'l Union*, 523 U.S. 653, 657 (1998). Rather, Section 301 "simply erects a gateway through which parties may pass into federal court; once they have entered, it does not restrict the legal landscape they may traverse." *Id.* at 658.

"Thus if, in the course of deciding whether a plaintiff is entitled to relief for the defendant's alleged violation of a contract, the defendant interposes the

affirmative defense that the contract was invalid, the court may, consistent with § 301(a), adjudicate that defense." *Id.* Or as stated by this Court, "to determine whether a breach of agreement has occurred, a court must necessarily determine whether a valid agreement exists in the first place." *Kozera v. Westchester-Fairfield Chapter of Nat'l Elec. Contractors Ass'n, Inc.*, 909 F.2d 48, 52 (2d Cir. 1990). For these reasons, federal courts have long exercised jurisdiction under Section 301 to determine whether there exists a contract imposing a duty to arbitrate. *See generally Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co.*, 312 F.2d 181 (2d Cir.), *cert. denied*, 374 U.S. 830 (1962).

In sum, this Court should disregard Local 3's nonsensical arguments that its mere assertion that the parties never actually had a valid collective bargaining agreement deprived the District Court (or even this Court) of subject matter jurisdiction. The determination of whether the parties had a valid collective bargaining agreement was well within the District Court's jurisdiction; and therefore so was determining whether, applying the limited judicial review of arbitration awards, Local 3 was properly found to have violated the parties' agreement by its blockade.

II. The District Court Should Have Found that the Parties Remain Bound by a Collectively Bargained No-Strike and Arbitration Agreement

Local 3 concedes that "[t]here is no dispute that both parties at the time they agreed to arbitrate . . . believed there was a valid CBA in place." (Ap. Br. at 32.)

But Local 3 argues that because the NLRB later determined that there had been "no meeting of the minds" regarding the inclusion of location-specific "riders" into a new overall collective bargaining agreement, the parties had effectively never renewed their expired previous agreement and its long acknowledged and undisputed no-strike and arbitration provisions, and thus the Union became retroactively entitled to strike and the Arbitrator retroactively lost his authority to punish or enjoin the Union's striking.

Local 3 purports to base this theory, the core of its appeal, on "federal labor law." (*See* Ap. Br. at 22.) As an initial matter, Local 3 cites not a single case, statute, or other authority to support its repeated insistence that the NLRB's supposed "no meeting of the minds"-based invalidation of the parties' contract has retroactive effect. And in fact there is no authority for such an outlandish proposition.

In any event, Local 3's assertions that there is now no contract are based only on an *NLRB* decision interpreting *the NLRA*. While that is certainly one form of "federal labor law," it is not *the* federal labor law governing this case. There is a different "federal labor law" applied by federal *courts* interpreting the *LMRA*, and that law includes an entirely different standard for determining whether employers and unions have enforceable contracts. Under the federal courts' LMRA standards, the parties here *clearly did* reach a binding and enforceable contract, one

which (still) prohibits striking and requires arbitration of their disputes. While the District Court shied away from this conclusion and instead enforced only half of the arbitral award, this Court should not.

In *Litton Financial Printing Division v. NLRB*, the Supreme Court stated plainly that while the NLRB may "interpret collective bargaining agreements in the context of unfair labor practice adjudication," it is "neither the sole nor the primary source of authority in such matters"; instead, "[a]rbitrators and courts are still the principal sources of contract interpretation." 501 U.S. 190, 202 (1991) (citations and internal quotations omitted). Because Section 301 of the LMRA "authorizes *federal courts* to fashion a body of federal law for the enforcement of collective bargaining agreements," it would "risk the development of conflicting principles were we to defer to the Board in its interpretation of the contract, as distinct from its devising a remedy for the unfair labor practice that follows from a breach of contract." *Id.* at 202-03 (emphasis in original) (internal citations and quotations omitted).

It is well-established that in a federal court action under Section 301, "technical rules of contract do not control the question of whether a collective bargaining agreement has been reached." *Am. Fed'n of Television & Radio Artists v. Inner City Broad. Corp.*, 748 F.2d 884, 886-87 (2d Cir. 1984). The determination is instead guided by federal case law which, to enhance the stability

of bargaining relationships, "encourages the formation of collective bargaining agreements." *Id.* at 886. Thus, to determine whether a collective bargaining agreement exists, courts look to surrounding circumstances and the parties' conduct manifesting their intent to abide by agreed-upon terms. *See Mack Trucks, Inc. v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 856 F.2d 579, 592 (3d Cir. 1989); *Robbins v. Lynch*, 836 F.2d 330, 332 (7th Cir.1988) ("Employers may adopt a collective bargaining agreement by a course of conduct."). Moreover, "parties can form a binding agreement which they intend to be final, despite leaving certain terms open for future negotiation." *Bobbie Brooks, Inc. v. Int'l Ladies Garment Workers' Union*, 835 F.2d 1164, 1168 (6th Cir. 1987) (internal quotation omitted)).

Local 3's arguments are completely foreclosed by this Court's decision in *Washington Heights-West Harlem-Inwood Mental Health Council, Inc., v. District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO*, 748 F.2d 105 (2d Cir. 1984). In that case an employer was compelled to arbitrate a dispute pursuant to the grievance and arbitration clause of a purported collective bargaining agreement that had not been reduced to writing because certain of its other terms were still disputed. *Id.* at 108-09. The parties originally believed that they had negotiated a new agreement and abided by its terms, while "benefitt[ing] substantially from the mutual assumption that there was an

agreement." *Id.* at 108. (The same is true here.) The parties subsequently realized that disputed terms remained. *Id.* at 106. (The same is true here.) The employer eventually filed an unfair labor practice charge with the NLRB alleging that the union had refused to reduce the terms of the agreement they had negotiated to writing; the NLRB dismissed the charge. *Id.* (The same is true here.) When the employer then brought a Section 301 action to vacate an arbitration award for the union, the district court granted summary judgment for the employer and vacated the arbitrator's decision, holding there had been "no formal meeting of the minds" on the contract's terms. *Id.* This is precisely the argument Local 3 asserts here.

This Court, however, reversed, suggesting that the district court had mistakenly interpreted certain precedents to mandate "elevating contract formalism over the parties' intent." *Id.* at 107. It ordered the district court to determine whether the parties had *in fact* agreed to submit disputes to arbitration in the relevant time period; if so, the arbitrator's award should have been upheld. *Id.* at 107-09. On remand, the district court found "there was an oral understanding on a successor collective bargaining agreement, even if there was not a meeting of the minds on all the details of that accord," and "[t]he parties had agreed, at least, to be bound by the grievance and arbitration provisions of the contract while reducing the agreement to writing," which "would require the affirmance and enforcement of the arbitrator's award." *Wash. Hts.-W. Harlem-Inwood Mental Health Council,*

Inc. v. Dist. 1199, Nat'l Union of Hosp. and Health Care Employees, 608 F. Supp. 395, 396 (S.D.N.Y. 1985). The District Court should have found the same thing here.

Also instructive is the Sixth Circuit's opinion in *Bobbie Brooks.* The employer there sought a declaratory judgment that no collective bargaining agreement existed, and so it should not be required to arbitrate a union grievance over severance pay for certain employees; the union counterclaimed for a declaratory judgment that a collective bargaining agreement *did* exist, and an order compelling arbitration. 835 F.2d at 1166.

The Court of Appeals noted that in that case (similar to here) "collective bargaining agreements between the Union and the Company have consisted of a Master Agreement, Supplemental Agreements containing terms applicable to individual plants, and side letter agreements modifying the Master Agreement." *Id.* at 1165. The parties had an undisputed contract from 1982-1985; shortly prior to its expiration, they met to negotiate a new contract, and were able to resolve all issues except "non-union production." *Id.* at 1166. After working out the other issues, the negotiators "congratulated each other," and signed a handwritten "Memorandum of Agreement," which they understood to extend the 1982-85 agreement, "because management-labor activities continued as though a contract were in place," "[e]mployees at the three facilities covered by the Master

Agreement subsequently ratified the terms negotiated," "management was informed of the ratification," and "[t]he new economic terms of the July 18th Memorandum of Agreement were promptly implemented by the Company." *Id.* That is almost precisely what occurred in this case.

The company later decided to shut down certain unionized production facilities; when the union then sought to arbitrate the amount of severance pay for the affected employees, the company asserted that no contract had ever been reached and refused to participate in the arbitration. *Id.* at 1167. The sole issue, according to the Sixth Circuit, was whether the parties' MOA was a binding agreement or else one "contingent on the resolution of the non-union production issue." *Id.* The Court rejected the employer's argument "that there was no meeting of the minds between the parties because there was still a dispute over a substantive term"; it instead stressed that in the realm of labor contracts, "technical rules of contract law are not strictly binding," and (as quoted earlier) "parties can form a binding agreement which they intend to be final, despite leaving certain terms open for future negotiation." *Id.* at 1168. The Court emphasized that "[t]he tone and temperament of the parties at the conclusion of the July 18th meeting suggested that a binding agreement had been reached," as did "the course of conduct by the Company after the July 18th meeting," wherein "[g]rievances were processed as usual," "union dues were checked off," and in particular, "the

Company[] implement[ed] the economic terms of the agreement." *Id.* at 1169. Again, that is almost precisely what occurred in this case and, as in *Bobbie Brooks*, the Court here should conclude that the parties remained bound by a collective bargaining agreement.

The Sixth Circuit reinforced this flexible and common-sense approach to labor contract formation in *International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers-Local 1603 v. Transue & Williams Corp.*, 879 F.2d 1388, 1389-90 (6th Cir. 1989). In that case, the union and employer "believed that they had reached a consensus on the terms of a new collective bargaining agreement," the agreement was ratified by the union's members, and the parties complied with all of its terms – but they later discovered that, as in *Bobbie Brooks*, a particular term (this time, the inclusion of a "successors and assigns" provision) remained disputed.

The employer later "assert[ed] that no new collective bargaining agreement had been reached because the parties never agreed on the successors and assigns issue," but "did not state that [it] was attempting to revoke the parties' agreement as to the grievance procedures, including the right to proceed to binding arbitration." *Id.* at 1390. The union charged the employer before the NLRB for failing to execute the agreement, but "the NLRB Regional Director found that the parties had failed to agree on the 'successors and assigns' provision," and thus,

"[The employer's] refusal to execute a new collective bargaining agreement was excused." *Id.* The parties then "worked peacefully together without a formal collective bargaining agreement" for nearly a year, even processing several grievances, until the employer announced it would not grieve or arbitrate several disputes, "because a new collective bargaining agreement was never executed." *Id.* That led the union to bring a Section 301 claim to compel arbitration.

The Sixth Circuit affirmed the district court's order requiring the employer to proceed to arbitration. Citing *Retail Clerks International Association, Local Unions Nos. 128 and 633 v. Lion Dry Goods*, 369 U.S. 17 (1962) and its own precedents, the court stated that "Section 301 jurisdiction does not require the parties to enjoy a meeting of the minds on all issues of a completed labor contract," and "[a] labor contract may fall within the parameters of Section 301 even if the employer and the union have not resolved disputes over substantive terms, including wage rates and work place conditions." *Id.* at 1392. "Because federal labor policy has emphasized the important goal of maintaining industrial peace, the technical rules of commercial contract law need not be strictly applied to labor contracts," and "the existence of a labor contract does not depend on its reduction

in writing; it can be shown by conduct manifesting an intention to abide by agreed-upon terms." *Id.* (internal quotations omitted).[4]

Based on their briefing in the District Court, Local 3 and the NLRB will invariably attempt to distinguish *Washington Heights* because in that case the NLRB had dismissed charges over the union's failure to execute an agreement, and thus there was no subsequent "NLRB determination of no contract." They will also inevitably argue that neither *Washington Heights* nor *Boilermakers-Local 1603 v. Transue & Williams Corp.*, 879 F.2d 1388, 1390 (6th Cir. 1989) involved a final Board order but only the General Counsel's decision not to issue complaint, and thus both cases lack the preclusiveness of the NLRB's "no meeting of the minds" decision here. And they will presumably distinguish *Bobbie Brooks* and *Eastern Airlines* because the NLRB was uninvolved in those cases.

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[4] *See also Eastern Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 861 F.2d 1546 (11th Cir. 1988) (citing, *inter alia*, *Wash. Hts.-W. Harlem-Inwood Mental Health Council*). There, after announcing that they had reached a collective bargaining agreement, the parties "realized that certain important terms were unclear," including pay rates, yet they "continued to affirm the existence of a collective bargaining agreement," and "processed some fifty grievances under non-contested portions" of it. *Id.* at 1548, 1553. But when the union sought to invoke arbitration proceedings over a pay rate dispute, the employer asserted that, despite its earlier belief to the contrary, there was no agreement between the parties. *Id.* at 1549-50. The Railway Labor Act (RLA) governed the dispute, but "[a]s under the National Labor Relations Act, our resolution of this contract-formation dispute is guided by the general common law of contracts," and "[i]n light of the important federal policy favoring the existence of collective-bargaining agreements . . . contract law may be given a liberal interpretation." *Id.* at 1550 (citations omitted). The Eleventh Circuit concluded that there was "a plain course of conduct after the signing of [the agreement] that evinces an intent to be bound by a contract notwithstanding disagreements over certain of its terms." *Id.* at 1553.

Notwithstanding any such attempts to distinguish *Washington Heights* and *Transue & Williams*, the NLRB's refusal to issue a complaint in those cases is "entitled to great weight." *Hanna Mining Co. v. Dist. 2, Marine Engineers Beneficial Ass'n, AFL-CIO*, 382 U.S. 181, 192 (1965). But more importantly, in all of the cases cited above, federal appellate courts applied a completely different standard than the NLRB's in order to find that there *is* a contract in place – even if some of its terms remain disputed and one party later tries to disown it.

The salient facts described earlier are well-documented, undisputed, and fit squarely within the Section 301 standards for contract formation: Time Warner Cable and Local 3 were parties to a collective bargaining agreement from April 1, 2009 through March 31, 2013; this collective bargaining agreement stated that any "dispute or disagreement" over its interpretation or application not resolved by the parties is subject to binding arbitration, and "[t]here shall be no cessation or stoppage of work, service or employment, on the part of, or at the instance of either party, during the term of this Agreement"; in late March 2013 Local 3 and Time Warner Cable signed (and Local 3's website trumpets that its membership unanimously ratified) a memorandum of agreement renewing the prior collective bargaining agreement for three more years with specified improvements to pay rates and benefits; for the next several years Local 3 repeatedly conceded that it was bound by that collective bargaining agreement; Local 3 has never accused

Time Warner Cable of failing to implement the wage increases and benefit improvements it mandates; and both parties repeatedly invoked the agreement's grievance and arbitration clauses, both before and after the events that led to this case. In particular, Local 3 has repeatedly acknowledged in multiple forums, in writing, and even under oath, that the MOA incorporated the prior collective bargaining agreement's no-strike and arbitration clauses and that Local 3 continues to be bound by them.

For all of these reasons, Local 3 clearly manifested its intent to be bound by the parties' collective bargaining agreement – including its no-strike and arbitration provisions – even if the inclusion of location-specific riders within it remained disputed. This Court should reject Local 3's transparent attempt to evade its own agreements on the basis of after-acquired, tangential excuses.

III. At the Very Least, this Court Should Affirm the District Court's Determination that the Parties Had a Binding Agreement To Arbitrate This Dispute and that Local 3 Waived Any Objections to Arbitrability

As explained in the preceding section, Time Warner Cable reached an LMRA Section 301-cognizable collective bargaining agreement, which included enforceable no-strike and arbitration provisions. For this reason, the District Court should have confirmed the entirety of the Arbitrator's remedy for Local 3's blockade in flagrant violation of that contract. However, even if this Court disagrees, it still can and should affirm the District Court's judgment that at the

outset of their arbitration the parties reached – and Local 3 waived any objections to – an enforceable stand-alone agreement to arbitrate the events of April 2, 2014. For this reason too, as explained more fully below, Local 3's appeal should be denied.

A. The Parties Had a Binding Agreement To Arbitrate This Dispute

It is beyond the cavil that federal law strongly favors resolving labor/management disputes through consensual grievance and arbitration proceedings. *See, e.g.*, *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *and United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). It is also hornbook law that the duty to arbitrate is contractual in nature, *see, e.g., Atkinson v. Sinclair Refining Co.*, 370 U.S. 239 (1962), and that the judicial function in Section 301 actions to confirm arbitration awards is limited to examining the parties' contract to determine whether they were actually obligated to arbitrate the particular issue at hand, with a strong presumption in favor of arbitrability. *Warrior & Gulf Nav.*, 363 U.S. at 582-83. Thus, the scope of an arbitrator's authority "generally depends on the intention of the parties to an arbitration, and is determined by the agreement or submission." *Ottley v. Schwartzberg*, 819 F.2d 373, 376 (2d Cir. 1987).

As recited in the District Court's opinion, the Fifth Circuit has explained that

"[t]he scope of an arbitrator's authority is not always controlled by the collective bargaining agreement alone," and "[b]efore arbitration can actually proceed, it is necessary for the parties to supplement the agreement to arbitrate by defining the issue to be submitted to the arbitrator and by explicitly giving him authority to act." (SA 35-36 (citing *Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Indep. Truck Drivers Union, Local No. 1*, 611 F.2d 580, 583-84 (5th Cir. 1980).) This Court held similarly fifty years ago, in a case where the parties disputed whether their agreement gave an arbitrator authority to decide the threshold question of the grievance's arbitrability. As this Court noted then, the parties' decision that the arbitrator should determine arbitrability was "clearly demonstrated" when they agreed on the following submission of issue at the outset of the arbitration: "The Arbitrator is to rule on the issue of 'Arbitrability,' " and the arbitrator proceeded to hear the dispute. *Metal Products Workers Union, Local 1645, UAW-AFL-CIO v. Torrington Co.*, 358 F.2d 103, 105 (2d Cir. 1966).

Local 3 cannot deny that its counsel signed a "piece of paper" (as it is fond of saying) at the outset of the arbitration hearing stating that the parties agreed to arbitrate whether "the Union violate[d] the no-strike provision of the collective bargaining agreement," and "[i]f so, what shall be the remedy?" So instead, it seeks to evade that agreement by resorting to convoluted arguments and irrelevant

hairsplitting about whether that agreement's wording differed from the wording of Time Warner Cable's initial written demand for arbitration, whether the Arbitrator later rephrased the issue in his interim awards, and the precise meaning of "the arbitration agreement." (*See* Ap. Br. at 11-15, 17-18.) These arguments are as specious as they are desperate; they demonstrate only that Local 3's perspective on agreements to arbitrate reviewed and signed by its counsel is essentially the same as its perspective on fully-negotiated collective bargaining agreements ratified by its full membership: an agreement only exists when it benefits Local 3.

According to the definitive treatise on labor arbitration, Elkouri & Elkouri, *How Arbitration Works* (7th ed. 2012),[5] Ch. 7.3.B: "[t]he grievance statement filed at the initial step of the internal dispute resolution process may define the issue or issues," but "[a]s the grievance is processed through several steps of the internal procedure, the issue may be more significantly defined," and "[s]ometimes the parties agree to a statement of the issue during the course of the hearing, when the evidence places the dispute in sharper focus," or "[t]he arbitrator also may initiate a discussion to clarify the issue and its scope, which could produce a different statement, perhaps worded by the arbitrator and accepted by the parties." Either way, "[f]ormal pleadings are not used in arbitration," but "at some point, the issue

[5] *How Arbitration Works* has long been cited by federal courts as an authoritative treatise. *See, e.g.*, *Cornelius v. Nutt*, 472 U.S. 648, 670 (1985); *and Conn. Light & Power Co. v. Local 420, Int'l Bhd. of Elec. Workers, AFL-CIO*, 718 F.2d 14, 20 (2d Cir. 1983).

to be resolved by the arbitrator must be specifically stated," and "[c]ourts generally give the same deference to an arbitrator's interpretation of the statement and scope of the issue submitted as they give to the arbitrator's interpretation of the collective bargaining agreement." There is no authority anywhere supporting Local 3's insistence that a demand for arbitration, statement of issues signed at arbitration, and recitation of the issues decided in an arbitrator's award must be precisely verbatim or identical.

As the District Court concluded, "[t]he language of the July 24, 2014 agreement is substantively the same as the wording used by the arbitrator to frame the dispute in his awards and it clearly evinces the parties' intention to arbitrate the narrow dispute at issue in this case." (SA 36-37) In fact, Local 3 framed the issue substantively identically in its own post-arbitration brief: "Did the Union violate the no-strike clause of the collective bargaining agreement, if so, what shall be the remedy?" (JA 319.) This is the issue that the parties agreed to arbitrate, whatever the trifling distinctions in its wording that Local 3 punctiliously decries; it was binding on the parties *regardless of* the validity or enforceability of their underlying collective bargaining agreement. Thus the Arbitrator correctly rendered his decision "pursuant to the arbitration clause in [the parties'] collective

bargaining agreement,"[6] and this Court may do the same.

B. Local 3 Waived Any Objections To the Arbitration

Because arbitration is a creature of contract, federal appellate courts have long agreed that objections to arbitrability – and to the jurisdiction of federal courts to confirm arbitration awards – must be timely made, or else are waived. *See, e.g.*, *ConnTech Dev. Co. v. Univ. of Conn. Educ. Props., Inc.*, 102 F.3d 677, 685 (2d Cir. 1996); *see also United Indus. Workers v. Gvmt. of V.I.*, 987 F.2d 162, 168 (3d Cir. 1993) ("because arbitrators derive their authority from the contractual agreement of the parties, a party may waive its right to challenge an arbitrator's authority to decide a matter by voluntarily participating in an arbitration and failing to object on the grounds that there was no agreement to arbitrate") (citing Fifth, Seventh, and Ninth Circuit precedents). Where a party "willingly and without reservation allows an issue to be submitted to arbitration, he cannot await the outcome and then later argue that the arbitrator lacked authority to decide the matter." *AGCO Corp. v. Anglin*, 216 F.3d 589, 593 (7th Cir. 2000). Yet that is exactly what Local 3 is attempting to do here.

Local 3 long ago waived any objections to the substantive arbitrability of

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[6] Local 3 also asserts that the parties' formal written statement of the issue to be arbitrated was never submitted into evidence as an exhibit at the arbitration hearing, so "how could it be considered by the District Court as a 'foundational document for the arbitration?' " (Ap. Br. at 12-13.) This is so laughable it is hardly worth addressing. Local 3 cites no authority stating that the formal "issue for arbitration" document is supposed to be an exhibit at that arbitration, and none exists. It was more than sufficient that the parties and Arbitrator expressly agreed on the record and in writing as to the issue to be arbitrated.

this dispute by failing to timely raise them to the Arbitrator or the District Court. As described earlier, Local 3 originally voiced procedural objections to the initiation of arbitration, arguing that Time Warner Cable's demand for arbitration was untimely filed, and that Time Warner Cable waived its right to arbitrate by first initiating a *Boys Markets* action in the District Court. Then, throughout the arbitration, Local 3 clung to its discredited assertion that there was no strike at all on April 2, 2014.

Local 3 could easily have also sought to stay the arbitration based on its present contention that there was no collective bargaining agreement in place. Or it could have raised the issue with the Arbitrator at the outset of the arbitration proceeding. After all, Local 3 was aware by March 31, 2014 (when Time Warner Cable filed its unfair labor practice charge against Local 3), and before the arbitration began, that the parties had failed to agree in writing on whether their collective bargaining agreement included the disputed riders or not – and that the controversy had been brought to the NLRB. In fact, in the very first brief that it filed in this matter with District Court – in April 2014, shortly after the blockade and long before arbitration commenced – Local 3 argued that "[t]he Union and TWC have been parties to a series of collectively bargained agreements, the most recent of which having expired on March 31, 2013," but "the NLRB will have to determine whether the parties in fact reached an agreement for a successor

agreement." (*See* No. 14 Civ. 2437, Docket No. 13, at 1-2.)

But Local 3 failed to raise this issue in any forum. Local 3 never protested or reserved any objections to the substantive arbitrability of the events of April 2, 2014 before or during the arbitration. In particular, it never sought dismissal or delay of the arbitration because of any pending or impending NLRB proceeding. Because Local 3 freely agreed to arbitrate the legality of and remedy for its April 2, 2014 blockade, and never objected to the Arbitrator's authority to hear and decide that dispute, it is now bound by the Arbitrator's determination, and the Arbitrator's award should be confirmed and enforced.

IV. The District Court Should Have Confirmed That Part of the Arbitration Award Directing Local 3 To Refrain From Future Violations of the Parties' No-Strike Agreement

After expressly refusing to determine whether the Time Warner Cable-Local 3 collective bargaining agreement is valid and enforceable (JA 530), the District Court later assumed that it is not, and thus refused to confirm the portion of the Arbitrator's award directing Local 3 not to engage in future similar violations of the agreement's no-strike provision. But regardless of whether the parties continue to have a valid collective bargaining agreement (which they do), the District Court erred; it should have confirmed the Arbitrator's entire decision, including his award of future relief.

As the Supreme Court has noted: "When an arbitrator is commissioned to

interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of the problem," especially "when it comes to formulating remedies"; "There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency." *United Steelworkers of Amer. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). This judicial deference reflects the principle that "[t]he remedy for unduly broad arbitral powers is not judicial intervention: it is for the parties to draft their agreement to reflect the scope of power they would like their arbitrator to exercise." *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 345 (2d Cir. 2010). In particular, "[a]n arbitration panel may grant equitable relief that a Court could not." *Sperry Int'l Trade v. Government of Israel*, 532 F. Supp. 901, 905 (S.D.N.Y. 1982), *aff'd*, 689 F.2d 301 (2d Cir. 1982).

As this Court has noted, "[t]he benefit of having the arbitrator's decision is particularly important given that arbitrators are generally afforded greater flexibility in fashioning remedies than are courts," so "[w]here an arbitration clause is broad, as here, arbitrators have the discretion to order remedies they determine appropriate, so long as they do not exceed the power granted to them by the contract itself." *Banco de Seguros del Estado v. Mut. Marine Office, Inc.*, 344 F.3d 255, 262 (2d Cir. 2003). "[I]t is not the role of the courts to undermine the

comprehensive grant of authority to arbitrators by prohibiting them from fashioning awards or remedies to ensure a meaningful final award." *Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 902 (2d Cir. 2015) (internal quotations omitted).[7]

As this Court recently summarized: as an arbitration-reviewing court, "we do not consider whether the punishment imposed was the most appropriate," or "how we would have resolved the dispute," but only whether the arbitrator was "even arguably construing or applying the contract and acting within the scope of his authority." *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527, 537-37 (2016).

As discussed at length in the District Court's opinion, at the outset of the arbitration proceeding both parties signed the agreement submitting the seemingly simple issue to the Arbitrator: "Did the Union violate the no-strike provision of the collective bargaining agreement? If so, what shall be the remedy?" Contrary to the District Court's clearly erroneous assertion, the parties' broadly-worded agreement to arbitrate – and the flexibility it allowed the Arbitrator to craft a remedy – is not reasonably questionable. The issue presented of "What shall be

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[7] Many of these cases involved the Federal Arbitration Act, not the LMRA. But as the District Court noted, "federal courts enforcing labor arbitration awards look to the FAA to guide the development of rules of federal common law to govern such disputes pursuant to the authority to develop such rules granted under 29 U.S.C. § 185." (SA 29 (internal quotations omitted) (citing, *inter alia*, *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987).)

the remedy" surely empowered the arbitrator to issue prospective relief, reflecting his considered judgment as to what was required to fully remedy Local 3's outrageous blockade.

For all of these reasons, if the Arbitrator, pursuant to the broad remedial authority the parties conferred upon him, saw fit to not merely award Time Warner Cable damages for Local 3's past violations of the parties' no-strike provision, but to also order Local 3 to commit no further such violations, that was his prerogative – and the District Court should have respected it. The District Court's failure to do so plainly runs afoul of the limited scope of judicial review of arbitration awards, particularly as to the award of remedies.

V. The Court Should Reject Local 3's "Public Policy" Arguments

Local 3's second "point" on appeal is that a "public policy exception" in favor of striking should have led the District Court to set aside the arbitration award.[8] Its argument, however, relies on poor reasoning and inapposite cases, and ignores clearly defined public policies that *favor* confirmation of bargained-for arbitration awards over unlawful strikes like the one that occurred here.

As the District Court noted, the "public policy exception" to arbitral award confirmation is "extremely limited." (SA 33.) The Supreme Court has cautioned

[8] The term "point" implies narrowness or precision; Local 3's arguments, however, meander through eighteen disjointed and confusing pages laden with copied and pasted quotations and string citations of often uncertain pertinence. This response reflects only Time Warner Cable's best attempt to decipher and address Local 3's current arguments.

that there is no "broad judicial power to set aside arbitration awards as against public policy." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987). Given federal courts' "nearly total deference to arbitral decisions," the "the party seeking the benefit of the exception must establish its existence." *Local 97, Int'l Bhd. of Elec. Workers, A.F.L.-C.I.O. v. Niagara Mohawk Power Corp.*, 196 F.3d 117, 125 (2d Cir. 1999). "A court may vacate an arbitral award on public policy grounds *only* if it can demonstrate that the policy is one that *specifically militates* against the relief ordered by the arbitrator." *Id.* (internal quotations omitted) (emphasis added). To do this, "the court must determine whether the award itself, as contrasted with the reasoning that underlies the award, creates an explicit conflict with other laws and legal precedents and thus clearly violates an identifiable public policy." *Id.* (internal quotations omitted). As this all suggests, arbitration awards should be overturned as conflicting with public policy only in "rare cases." *Saint Mary Home, Inc. v. Service Employees Int'l Union, Dist. 1199*, 116 F.3d 41, 46 (2d Cir. 1997).

This is not one of those rare cases. Local 3 asserts that "enforcement of the award would violate a clear public policy," namely the right of employees to strike. (Ap. Br. at 25-26.) And Local 3 cites numerous cases to support the unremarkable truisms that employees generally have a collective right to strike and that any waiver of such right must be "clear and unmistakable." But Local 3 (naturally)

ignores an equally well-established labor law truism: a union may waive its right to strike in exchange for an employer's agreement to arbitrate their disputes, *see, e.g.*, *NLRB v. Magnavox Co. of Tenn.*, 415 U.S. 322, 326 (1974), which is what Local 3 did here (clearly and unmistakably).

Local 3 cites no case to support its corollary argument, which requires an Olympics-level leap of logic: that the strong and well-established public policy favoring the right to strike is offended where (as here) an employer and union reach a collective bargaining agreement that includes a no-strike rule in exchange for arbitration of all grievances, both sides repeatedly express their recognition of the agreement, the Union then foments and leads a strike anyway, an arbitrator concludes that doing so violated the agreement and that the union should pay damages and not repeat its misconduct – but the parties only *then* learn that because of a technicality, their overall collective bargaining agreement was (purportedly) never perfected. In fact, Local 3 admits that its public policy argument is really just a Catch-22 in its own favor: "it is impossible to have [had] a waiver on July 24th, if both parties were under the mistaken belief there was a contract in place at the time they agreed to arbitrate." (Ap. Br. at 24.)

Most importantly, Local 3 disregards the fact that while there may be a generalized public policy interest in the right to "strike," there is no public policy interest protecting mass pickets of the sort in which it engaged here. Local 3

conveniently ignores that labor actions such as "obstructing entrance to and egress from [a] company's factory," and "obstructing the streets and public roads surrounding the factory" have been held unprotected and punishable for at least the last seven decades. *See Allen-Bradley Local No. 1111, United Elec., Radio and Machine Workers of Am. v. Wisc. Employment Relations Bd.*, 315 U.S. 740, 748 (1942).

Even the NLRB, " 'the executive agency authorized to oversee *federal labor policy*' " (Docket No. 54-1, at 9-10 (quoting *Danielson v. Int'l Org. of Masters, Mates & Pilots*, 521 F.2d 747, 755 (2d Cir. 1975) (emphasis added) has made it clear that the "right to strike" does not encompass street-barricading, ingress and egress-blocking, customer service-interfering mass pickets like the one by Local 3 that triggered this case – in fact, in one case involving Local 3. *See, e.g., Tube Craft*, 287 N.L.R.B. 491, 492 (1987) ("peaceful picketing[9] does not include the right to block access to the employer's premises"); *IBEW, L. 98 (TRI-M Group, LLC)*, 350 N.L.R.B. 1104, 1107 (2007) ("the Board has consistently found that the blocking of access to an employee's workplace constitutes unlawful restraint and coercion"), *aff'd*, 317 Fed. Appx. 269 (3d Cir. 2009); *and Local 3, IBEW (Cablevision Sys. of New York City Corp.),* 312 N.L.R.B. 487 (1993) (assembly of

[9] Local 3 suggests at one point that its conduct was protected "peaceful picketing," for which "injunctive relief outside the [National Labor Relations] Act is barred." (Ap. Br. at 21.) While Time Warner Cable commends Local 3 and its members for abstaining from acts or threats of violence on April 2, 2014, that does not mean that their blockade of the street and the Company's facility was "peaceful" and thus protected in any way under the law.

100 to 150 demonstrators with trucks blocking street was unlawful). Presumably for this reason, despite intervening in this case, the NLRB does not oppose confirmation of the Arbitrator's monetary award. (Docket No. 54-1, at 7.)

Thus, Local 3's argument is exactly backwards: public policies counsel in favor of, not against, confirming the arbitrator's award. Furthermore, Local 3's arguments to the contrary rely on cases that are either completely irrelevant or else that actually undermine its argument. In particular, Local 3 cites a variety of cases where an employer disciplined an employee for flagrantly illegal workplace conduct (smoking marijuana, embezzling money, driving a truck while drunk, or sexual harassment), the employee's union arbitrated the discipline, and the arbitrator's award overturned the discipline. (*See* Ap. Br. at 25, 29.)[10] But here, the arbitrator did not overturn an employer's attempt to penalize unlawful conduct – he blessed it. This case is thus squarely inapposite to those cited by Local 3. Rather than furthering public policies by vacating an arbitral award, Local 3 would have this Court undermine them.

In any event, let us assume generously that there is some public policy interest in allowing a union to block public streets and prevent hundreds of

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[10] Local 3 also cites *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. Keystone Consolidated Industries, Inc.*, 782 F.2d 1400, 1403-05 (7th Cir. 1986). As Local 3 states, *that* decision held that an arbitrator's refusal to apply ERISA's waiver provision to an employer's pension funding violated public policy. However, the Court reconsidered its decision following a petition for rehearing, withdrew it, and issued a subsequent opinion that in fact *affirmed* the District Court's enforcement of the arbitrator's award. *See* 793 F.2d 810, 811 & n.1 (7th Cir. 1986).

businesses and residences from having their internet, telephone, and cable television timely installed or serviced, all in order to protest its members' discipline for refusals to follow simple management instructions. Such purported public policy surely cannot outweigh the "firmly-established, legislatively-entrenched policy favoring resolution of labor disputes through arbitration." *Saint Mary Home, Inc. v. Serv. Employees Int'l Union, Dist. 1199*, 116 F.3d 41, 45 (2d Cir. 1997). For this reason as well, the Court should reject Local 3's "public policy" arguments for vacating the arbitrator's award – and should confirm the award in its entirety.

VI. *Mastro Plastics* Is Inapplicable to This Dispute

Local 3's final, throw-away argument is that the District Court should have vacated the entire arbitration award in light of *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). This point should not detain the Court.

Contrary to Local 3's assertion, *Mastro Plastics* does *not* establish any law, much less a "strong public policy," entitling employees and unions to strike whenever they see fit, without consequence. First, *Mastro Plastics* does not excuse *a union* from anything; it is generally applied to protect *employees* protesting perceived unfair labor practices from discipline. *Compare SDBC Holdings, Inc. v. NLRB*, 711 F.3d 281, 295 (2d Cir. 2013) ("Stella D'oro did not commit an unfair labor practice, and therefore the strikers did not qualify for protection as strikers

opposing an unfair labor practice") *with NLRB v. Milco, Inc.*, 388 F.2d 133, 139 (2d Cir. 1968) ("the strike was an unfair labor practice strike, and the strikers were protected against replacement") (both citing *Mastro Plastics*, 350 U.S. at 278).

Further, *Mastro Plastics* and its progeny only established a right to strike over "*serious* unfair labor practices" committed by an employer. *Sanchez v. NLRB*, 785 F.2d 409, 412 (2d Cir. 1986) (citing *Arlan's Dep't Store of Mich. Inc.*, 133 N.L.R.B. 802, 805 (1961) (emphasis added). And an unfair labor practice is only considered "serious" if it "go[es] to the essence of the bargaining relationship" and is " 'destructive of the foundation on which collective bargaining must rest.' " *Caterpillar Tractor Co. v. NLRB*, 658 F.2d 1242, 1245, 1247 (7th Cir. 1981) (quoting *Mastro Plastics*, 350 U.S. at 281).

The NLRB, recognizing the stringency of this standard, has held that the anti-union discharge of a shop steward for misconduct while circulating a union petition is *insufficiently* "serious" to justify a strike in contravention of a collectively bargained no-strike clause. *Arlan's Dep't Store*, 133 N.L.R.B. at 803. If a shop steward's discharge is insufficiently serious to justify a contract-violating strike, then the mere two-day suspension of a shop steward and several tool-refusing foremen is too. (*See* Ap. Br. at 39.) In fact, even the NLRB's Regional Director agreed that "the alleged violations of the Act at issue were not sufficiently serious to warrant a finding that the no-strike clause did not cover this strike." (JA

516-17.)

Moreover, a strike contravening a contractual no-strike clause cannot be a protected "serious unfair labor practice" strike if it is protesting something that can and should be arbitrated. *See Dow Chemical Co. v. NLRB*, 636 F.2d 1352 (3d Cir. 1980), *cert. denied*, 454 U.S. 818 (1981) (employer's unilateral adjustment of shift schedules, while arguably changing working conditions, could have been grieved and arbitrated – demonstrating that strike over change was not protected unfair labor practice strike). That is precisely this case: to the extent the parties disagreed over the Company's right to issue tools to its employees and then suspend several who refused to accept them, Local 3 contractually agreed that that dispute can be resolved through the arbitration process.

In the end, Local 3's April 2, 2014 actions were simply an attempt to have its cake and eat it too – after repeatedly demanding arbitration pursuant to the parties' then-undisputed contract, it decided to strike in protest over arbitrable disputes because doing so was apparently more to its liking. The Court should reject Local 3's attempt to inoculate its misbehavior under the guise of a half-baked *Mastro Plastics* argument.

CONCLUSION

For the foregoing reasons, Plaintiff/Appellee/Cross-Appellant Time Warner Cable New York City LLC respectfully requests that this Court reverse that portion of the District Court's Order striking future relief from the Arbitrator's final award, and otherwise affirm the District Court's Order confirming the monetary portion of the arbitral award.

Dated: New York, New York
August 29, 2016

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Certificate of Compliance

Kenneth A. Margolis, an attorney duly admitted to practice law in the state of New York and before this Court, hereby certifies on this 29th day of August, 2016 that in compliance with Fed. R. App. P. 32(a)(5) & (7), the Microsoft Word word-processing program on which this brief was drafted determined that this brief contains 13,814 words, not including the corporate disclosure statement, tables of contents and authorities, and this certification; and (a) the typeface used is Times New Roman, (b) the point size is 14, and (c) the line spacing is double.

/s/ Kenneth A. Margolis
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